United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7099

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GEORGE BEDROSIAN and THOMAS HAGAN, ROBERT HANDELMAN and BERNARD SHIPMAN, WALTER WILLIAMS and OTIS McGAUGHY (OMAR SEKOU TOURE), and all others similarly situated,

Plaintiff-Appellants

-vs-

JOSEPH D. MINTZ, Administrator, Erie County Bar Association Aid to Indigent Prisoners Society, Inc.; the ERIE COUNTY BAR ASSOCIATION AID TO INDIGENT PRISONERS SOCIETY, INC.; and CARMAN F. BALL, Justice of the Supreme Court and Presiding Judge of the Additional Special and Trial Term of the Wyoming County Court, in his representative and individual capacity,

Defendant-Appellees.

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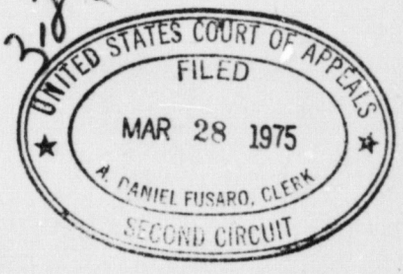

BRIEF FOR PLAINTIFF-APPELLANTS

HERMAN SCHWARTZ, ESQ.
EDWARD I. KOREN, ESQ.
N.Y.C.L.U. Foundation
525 O'Brian Hall, SUNYAB
Amherst, N. Y. 14260
(716) 636-2091

Attorneys for Plaintiff-Appellants

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UNITED STATES COURT OF APPEALS
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-vs-

JOSEPH D. MINTZ, etc., et al.

Defendant-Appellees

ISSUES PRESENTED

1. Whether the constitutionality of a judge's criteria for assignment of counsel can never present a federal question, even if such criteria are challenged as discriminatory.

2. Where a judge agrees to the assignment of lawyers chosen by the defendants, may he limit the class from which such counsel are chosen to lawyers admitted to the State Bar, even though (a) he is satisfied as to the out-of-state lawyers' competency and admitted them pro hac vice; and (b) the costs to the State of the two classes of lawyers are comparable?

3. Where defendants have chosen to be represented by unassigned out-of-state lawyers who are admitted pro hac vice, can the court refuse to allow such lawyers their travel and related costs, when such costs are allowed in-state lawyers?

STATEMENT

Proceedings to Date

Plaintiff-appellants filed a complaint under 42 U.S.C. §1983 in the United States District Court for the Western District of New York, charging discrimination in the appointment of counsel for the Attica defendants. After plaintiffs' interrogatories were answered, plaintiffs moved for summary judgment and, upon the discovery and affidavits, defendant-appellees cross-moved for a dismissal of the complaint. By opinion and order dated January 6, 1975, the district court, Curtin, C.J., granted defendants' motion to dismiss, finding that no substantial federal question was presented since assignment of counsel is in the complete discretion of a state trial judge.

Notice of appeal was filed on January 13, 1975. A civil appeal scheduling order was issued on February 11, 1975, and modified by order dated March 6, 1975 to advance the briefing and argument by one week, in response to plaintiffs' request for an enlargement of time in which to file plaintiffs' brief and appendix.

Factual Summary

In December, 1972, the Wyoming County Grand Jury issued a series of indictments because of events related to the Attica Prison uprising on September 9-13, 1971. These included several extremely grave charges against the prisoner-plaintiffs. After the indictments, efforts were made to obtain counsel. For various reasons, it was difficult to obtain counsel in Erie County,* and lawyers from elsewhere in the state and nation responded to an

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*See affidavit of defendant Joseph Mintz, App. p. 55a. Judge Ball avers several times that "there were and are attorneys who are licensed to practice law in New York State who were and are ready and willing to accept

appeal for help. The attorney-plaintiffs, who were and are experienced criminal lawyers and members of the Bars of the States of Michigan, Ohio, and Illinois, were among those who answered the call, and the indictee-plaintiffs asked the attorneys to represent them; in Williams' case, the mother of plaintiff McGaughy (Omar Sekou Toure) sought out plaintiff Williams. The representation arrangements were made in mid-1973.

On July 30, 1973, defendant Carman F. Ball, J.S.C., who has been presiding over the Special Attica Term, announced a policy of admitting and appointing counsel in these cases,* which he has described in this case as follows:

> "Because of the extraordinary circumstances of the Attica uprising, the Court in its discretion allowed defendants to choose counsel admitted to the Bar of New York as assigned counsel." Ball affidavit, ¶10, App. p. 18a.

He refused to allow lawyers not admitted to the New York Bar to be assigned, but did admit them pro hac vice.

This resulted in three categories of lawyers (and corresponding categories of defendants):

(a) Those appointed and assigned pursuant to N. Y. County Law §18-b who are members of the Erie County and New York State Bars and who were drawn from the County list of attorneys available to take cases.

(b) Those appointed and assigned pursuant to County Law §18-b who are members of the New York State Bar but not of the Erie County

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assignments." See, e.g., Ball Affidavit, ¶11, App. p. 18a. The point is not crucial to decision of this case, but for whatever it is worth, the personal recollection of plaintiffs' counsel is similar to the Mintz affidavit.

*Counsel has been informed that the legislature has allocated a budget of .75 million dollars for defense counsel fees and expenses out of a total Attica-related budget of several million.

Bar and who were not drawn from the County list of area attorneys available to take indigent criminal cases. The majority of these attorneys are from New York City.

(c) Those admitted pursuant to the Court of Appeals Rules for Admission of Attorneys, Rule 520.8(d)(1), admission pro hac vice, who are not members of either the New York State or Erie County Bars, but are members of the Bar and are licensed to practice law in other states.

The third category--the out-of-state lawyers--are not to be allowed compensation for their time or their disbursements, whereas the first two categories will be. The former will have to contribute their time without any compensation and will have to find ways to defray their expenses, either from their own pockets or otherwise. So far, the attorney-plaintiffs in this matter have contributed both time and expense money--up to December 1974, Williams, for example, had spent over $800 out of his own pocket, and Bedrosian had expended almost $1,300. Others have spent comparable amounts.

Some time prior to July 30, 1973, counsel herein had a conversation with Judge Ball in which the latter informed counsel that in order for an out-of-state attorney to be considered for admittance pro hac vice, the attorney would have to submit an affidavit setting forth his background and experience in criminal cases, indicating the courts and judges before whom he had appeared, as well as his willingness to consult and associate with named New York State attorneys; Judge Ball further noted that upon receipt of such papers, he would consider whether to admit such attorney(s) pro hac vice. Pursuant to this conversation, the contents of which were communicated to the central office of the Attica defense, all attorneys who sought admittance pro hac vice at or about that time and subsequently, submitted such affidavits.

With respect to attorneys who are members of the New York State Bar, no inquiry was made respecting either their competence, their present location, or their distance from Buffalo. Nor was any inquiry made by defendant Ball of any lawyer not a member of the New York State Bar, including the plaintiffs herein, about the expenses involved in his representation of any defendant, including the plaintiffs herein; on occasion, Judge Ball asked non-New York lawyers about their experience in criminal cases. See Ex. II to Cream affidavit, App. p. 20a-24a.

Certain members of the New York State Bar who were appointed live in Boston, Massachusetts, and West Hartford, Connecticut, respectively. Thus, Margaret Burnham, who was admitted on May 20, 1974, has an office at 2 Park Square, Boston, Massachusetts, and Morton Cohen, who was admitted in 1973, has an address at the University of Connecticut School of Law, West Hartford, Connecticut. Of the 42 attorneys who were assigned to the Attica cases, 13 live in New York City, 3 live in the Albany-Troy area, 4 live in other towns in New York State. These are in addition to the two above-described in Massachusetts and Connecticut.

The attorney-plaintiffs were admitted pro hac vice, and together with other out-of-state lawyers, protested the discriminatory refusal to assign them. No explanation was given by Judge Ball for his ruling until his response to an interrogatory served in this action as follows:

> "That requests for attorneys who were not licensed to practice in New York State were denied because there were and are attorneys who are licensed to practice in New York State who were and are ready and willing to accept assignments.
>
> "That the Court in its discretion did not assign out of state attorneys because the Court was unfamiliar with their backgrounds, in that their competence and understanding of New York State law and criminal procedure was not certified to by having passed the New York State Bar Examination, or by admittance to practice by an Appellate Division of the Supreme Court of New York. In addition, the Court feels the expenses

> involved in transportation, living expenses, accommodations for office space, etc., would be an excessive burden upon the taxpayers of New York State depleting the state funds which were intended for the legal defense of the defendants." Ball affidavit, ¶¶ 11, 12, App. p. 10a.

Efforts were made to appeal the ruling to the Appellate Division, but these were unavailing, that Court declaring in passing:

> "Although in the special circumstances of this case there appears to be no impediment to the appointment by the court of petitioner Goodman to represent petitioner Stroble, it remains a matter within the sound discretion of respondent." Goodman v. Ball, 45 A.D.2d 16, 17 (4th Dept. 1974).

Leave to appeal to the Court of Appeals was denied in July, 1974.

Suit was thereupon filed in the United States District Court. After discovery and the exchange of affidavits, plaintiffs moved for summary judgment and defendants moved to dismiss the complaint. The latter motion was granted by opinion and order dated January 6, 1975. In such opinion, the district court's ruling consisted essentially of the following:

> "Matters within the discretion of the state trial justice, such as the choice of assigned counsel, are reviewable on appeal, not under the Civil Rights Act. Pierson v. Ray, 386 U.S. 547 (1967), cited with approval in Scheuer v. Rhodes, 416 U.S. 232, at 244-45 (1974). See also Goodman v. Ball, 356 N.Y.S.2d 146 (1974)." P. 4.

ARGUMENT

I. THE DISTRICT COURT ERRED IN RULING THAT MATTERS IN A JUDGE'S DISCRETION CANNOT RAISE A SUBSTANTIAL FEDERAL QUESTION INVOLVING DISCRIMINATION.

Although the district court's opinion is not altogether clear, that court seems to have held that a trial judge's discretionary assignment of counsel is beyond any constitutional scrutiny, no matter what discrimination is alleged. Thus, the court declared:

> "The defendants contend, inter alia, that the appointment of counsel is within the sole discretion of the judge in the state court, and now reviewable under the Civil Rights Act (42 U.S.C. §1983). Because the court is in agreement with this position, a decision upon the issues of discrimination would be inappropriate." P. 3.

The court then went on to say:

> "The choice of assigned counsel to an indigent defendant is for the judge, not the defendant. United States ex rel. Torry v. Rockefeller, 361 F. Supp. 422 (N.D.N.Y. 1973); Davis v. Stevens, 326 F. Supp. 1102 (S.D.N.Y. 1971). If retained counsel is unable to proceed because his client becomes indigent, it is within the discretion of the trial judge to assign him, or another attorney of the judge's choice. Stream v. Beisheim, 34 App.Div.2d 542 (2d Dept. 1970).
>
> "Matters within the discretion of the state trial justice, such as the choice of assigned counsel, are reviewable on appeal, not under the Civil Rights Act. Pierson v. Ray, 386 U.S. 547 (1967), cited with approval in Scheuer v. Rhodes, 416 U.S. 232, at 244-45 (1974). See also Goodman v. Ball, 356 N.Y.S.2d 146 (1974).
>
> "Therefore, the motion of the defendants to dismiss is granted for failure of the plaintiffs to present a substantial federal question." P. 4.

It is important to note what is not involved here, as well as what is: plaintiffs are not arguing here that a defendant has the right to counsel of choice. Thus, we do not quarrel with the general proposition that "the choice of an assigned counsel is for the judge, not the defendant."

Plaintiffs are arguing, however, that when exercising his discretion and making his "choice of an assigned counsel," the trial judge cannot engage in unconstitutional discrimination. As the Supreme Court said of a similar claim in Schware v. Board of Examiners, 353 U.S. 232, 239 (1957):

> "Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory."

See also, In re Griffiths, 413 U.S. 717 (1973); cf. L.S.C.R.R.C. v. Wadmond, 299 F. Supp. 117, 129 n.6 (S.D.N.Y. 1969)(3-judge court), aff'd, 401 U.S. 154, 157 n.7 (1971).

Extended citation is not necessary to support the proposition that discretion, no matter how great, cannot be exercised in a constitutionally discriminatory manner. Is there any doubt that had Judge Ball announced he would appoint no blacks, Jews, Republicans, red-haired or politically active lawyers, substantial constitutional questions about discrimination would at least be raised and have to be faced?

Yet, the district court's view that because "the appointment of counsel is within the sole discretion of the judge in the state court . . . a decision on the issue of discrimination would be inappropriate" (italics added) leads logically to the conclusion that even if the trial judge had made such an announcement, the district court would have refused to consider "the issue of discrimination."

Talismanic use of the word "discretion" should not end all discussion and constitutional scrutiny. Indeed, what the trial court did was to decide the merits of the case while avoiding the substantive questions.

Plaintiffs-appellants would stress again that they are not denying that the trial judge in a criminal case has discretion over the assignment

of counsel. But like all discretion, it must be exercised within the constitutional constraints established by the Bill of Rights and other constitutional provisions. The district court's ruling clearly holds to the contrary, and should not be allowed to stand. Plaintiffs are entitled to prove the fact of discrimination (which is not disputed), that such discrimination impinges on constitutional rights and values, and that it is unjustified. To none of these did the district court address itself.

The district court's citation of Pierson v. Ray, 386 U.S. 547 (1967), and Scheuer v. Rhodes, 416 U.S. 232, 244-45 (1974), raises the possibility that the court believed that judicial immunity was involved. See also the court's statement that "matters within the discretion of the state trial justice, such as the choice of assigned counsel, are reviewable on appeal, not under the Civil Rights Act." But it is well-established in this circuit and elsewhere that the "immunity of judges to damage actions does not extend to actions for injunctions," Inmates of Brooklyn House of Detention for Men et al. v. S. Ct. Justices of Kings Cty. S. Ct., Civ. 72-C-393, p. 5 (E.D.N.Y. 1972) (not reported), particularly where, as here, we have an essentially administrative function, and there is no danger that the judicial function would be in any way impaired by a ruling on this essentially legal issue. See former Chief Judge Friendly's discussion in L.S.C.R.R.C. v. Wadmond, 299 F. Supp. at 123; Jacobson v. Schaefer, 441 F.2d 127, 130 (7th Cir. 1971); United States v. McLeod, 385 F.2d 734 (5th Cir. 1967); Stambler v. Dillon, 288 F. Supp. 646 (S.D.N.Y. 1968); Nicholson v. Board of Commissioners of Alabama State Bar Association, 338 F. Supp. 48, 52 n.4 (M.D. Ala. 1972)(3-judge court); Haley v. Troy, 338 F. Supp. 794 (D. Mass. 1972); Inmates of Brooklyn House of Detention for Men et al. v. S. Ct. Justices of Kings Cty. S. Ct., supra; Green v. City of Tampa, 335 F. Supp. 293, 297 (M.D. Fla. 1971);

Conover v. Montemuro, 304 F. Supp. 259, 262 (E.D. Pa. 1969); Bramlett v. Peterson, 307 F. Supp. 1311, 1321-1322 (M.D. Fla. 1969); Koen v. Long, 302 F. Supp. 1383 (E.D. Mo. 1969); Phillips v. Cole, 298 F. Supp. 1049 (N.D. Miss. 1968); cf. Hadnott v. Amos, 394 U.S. 358 (1968); Bivens v. Six Agents, 409 F.2d 718, 723 (2d Cir. 1969), rev'd on other grounds, 403 U.S. 388, 91 S. Ct. 1999 (1971); United States v. Clark, 249 F. Supp. 720 (S.D. Ala. 1965).

II. DEFENDANTS' DISCRIMINATION AGAINST OUT-OF-STATE LAWYERS HAS DENIED BOTH CLASSES OF PLAINTIFFS THE EQUAL PROTECTION OF THE LAW WITH RESPECT TO AN ADEQUATE DEFENSE AND THE RIGHT TO TRAVEL.

Although the issue raised by this case seems to be a matter of first impression, the controlling equal protection and related principles are well-established and clear: Although Judge Ball had discretion to appoint and thereby compensate and reimburse out-of-state attorneys, see Goodman v. Ball, supra, he chose not to. He (and the administrator-defendants) have thus made an invidious distinction between the indictee- and attorney-plaintiffs on the one hand, and Attica defendants and lawyers admitted to practice in New York on the other: the latter will be compensated for their time and expenses, whereas the former will not. The differentiation allegedly is based on fiscal considerations and competency. There is thus no doubt about the discrimination against out-of-staters and its basis.

Under well-established constitutional principles derived from the equal protection, privileges and immunities, effective assistance of counsel, and commerce clauses of the Constitution, such discrimination against clients with out-of-state lawyers, and their counsel is unconstitutional.

It is easiest to analyze the issues in the equal protection framework, with reference to the other provisions where appropriate.

A. Defendants' Discrimination Against The Choice Of Out-Of-State Counsel Interfered With The Indictee-Plaintiffs' Defenses To The Criminal Charges.

Dunn v. Blumstein, 405 U.S. 330, 335 (1972), teaches that "to decide whether a law violates the Equal Protection clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." And in light of those factors, the Court decides "what standard of review is appropriate."

In this case, the last question is not too important, for analysis of the justification proffered by defendants shows that the classification fails to meet even the most minimal scrutiny. Moreover, the "character of the classification" is obvious and undisputed, so that there is no need to discuss it any further.

1. The effect of the denial of compensation.

The Attica cases are extraordinarily complex. The multiplicity of charges, the numerous defendants, the complicated and confusing factual situations, the many, many motions and other legal moves that were and are necessary--all make these cases one of the most complex masses of litigation in the history of the criminal law. The legal complexities are compounded by the bitterness and alienation felt by so many defendants as a result of the events leading up to and after the uprising. The almost total indigency of these defendants is another complicating factor.

In matters of such gravity,* it is especially vital that defendants have full confidence and trust in their lawyer, if they are to be ensured truly effective assistance. Powell v. Alabama, 287 U.S. 45 (1953); Glasser v. United States, 315 U.S. 60, 70 (1942); United States ex rel. Lavis v. McMann, 386 F.2d 611, 618 (2d Cir. 1967). This is apparently undisputed, for in his affidavit, defendant Ball declared that "because of the extraordinary circumstances of the Attica uprising, the Court in its discretion allowed defendants to choose counsel admitted to the Bar of New York as assigned counsel." Ball affidavit, ¶10, App. p. 18a.

As the Appellate Division opinion makes clear, Judge Ball could have appointed out-of-state counsel as assigned counsel for any of the Attica defendants. He chose not to. In limiting assignments of counsel of choice to those "admitted to the Bar of New York," Judge Ball discriminated against the indictee-plaintiffs and interfered with their right to the effective assistance of counsel. The denial of fees and expenses means that it will be that much harder for the attorney-plaintiffs and their class to provide a maximally effective defense.

Obviously, these lawyers are not taking these cases for the money; indeed, it is undisputed that they are paying thousands of dollars in travel and other expense money out of their pockets. Furthermore, their personal integrity and oaths as attorneys ensure that they will do all in their power for their clients. But any defense--particularly in a case as complex and difficult as these--is only as effective as the resources. Here, a major factual investigation must be undertaken, involving the interviewing of many

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*Mr. Shipman has been indicted on first-degree kidnap charges; Mr. Hagan and Mr. McGaughy (Omar Sekou Toure) have been indicted on charges of kidnap, unlawful imprisonment, coercion, and assault.

witnesses by counsel. The clients must be visited. Without travel, telephone and other expenses and the resources provided by the compensation, the indictee-plaintiffs' defense will be that much weaker than prisoners with New York counsel of choice. These are lawyers in private practice. They can expend only so much time and out-of-pocket expense money, especially since the Attica Brothers Legal Defense, the central headquarters, is in desperate financial straits and can offer no assistance.* Thus, no matter how much personal effort the attorney-plaintiffs expend--and they have and will expend a great deal--if the resources aren't there, their effectiveness must be diminished.

This adverse impact is not really disputed. The State simply replied in argument below:

> "That if in fact the counsel retained by plaintiff-defendants are unable to effectively represent said defendants, plaintiff-defendants have knowingly and voluntarily waived such rights by virtue of their refusal to accept in-State assigned counsel." See Cream affidavit below of October 17, 1974.

To which the Ball affidavit adds:

> "The defendant knew that the attorney was not admitted to practice in New York State and that if he desired that attorney to represent him, the defendant and attorney understood that it would be without compensation being paid counsel by the State of New York." Ball affidavit, ¶13, App. p. 19a.

In other words, even though the defense suffers from the discrimination, it is the defendant's fault for choosing out-of-state counsel.

Such discrimination cannot be allowed. Although a defendant does not have "an absolute right to any particular counsel," United States v. Tortola, 464 F.2d 1202, 1210 (2d Cir. 1971) (emphasis added), especially if he tries to use such a claim to obstruct and impede the administration of

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*Judge Ball refused to allow payment of fees and expenses to the ABLL by order dated October 24, 1974.

justice, ibid., United States v. White, 451 F.2d 1225 (6th Cir. 1971), that is a quite different situation where, as here, a court decides to allow defendants assigned counsel and then discriminates on an in-state/out-of-state basis.

A discrimination so based is unwarranted not only for conventional equal protection reasons, but also because it violates the privileges and immunities clauses of Article IV, §2 of the Constitution. In a somewhat related case involving the legality of retaining out-of-state counsel in a federal case, Spanos v. Skouras Theatres Corp., 364 F.2d 161, 170 (2d Cir. 1966)(en banc)(Friendly, J.), the Court of Appeals for this Circuit declared:

> "We are persuaded, however, that where a right has been conferred on citizens by federal law, the constitutional guarantee against its abridgment must be read to include what is necessary and appropriate for its assertion. In an age of increased specialization and high mobility of the bar, this must comprehend the right to bring to the assistance of an attorney admitted in the resident state a lawyer licensed by 'public act' of any other state who is thought best fitted for the task, and to allow him to serve in whatever manner is most effective, subject only to valid rules of courts as to practice before them. Cf. Lefton v. City of Hattiesburg, 333 F.2d 280, 285 (5 Cir. 1964). Indeed, in instances where the federal claim or defense is unpopular, advice and assistance by an out-of-state lawyer may be the only means available for vindication. . . . Having exercised their constitutional right to obtain the expert legal assistance on their antitrust claim which they desired, defendants cannot be heard to object to paying the bill." 364 F.2d at 170. (Emphasis added.)

The Fifth Circuit has frequently noted the importance of out-of-state counsel in notorious criminal cases involving minorities or unpopular defendants. Lefton v. Hattiesburg, 333 F.2d 280, 285-86 (5th Cir. 1964); Sanders v. Russell, 401 F.2d 241, 244-45 (5th Cir. 1968). See also United States v. Bergamo, 154 F.2d 31, 35 (3d Cir. 1946); Cooper v. Hutchinson, 184 F.2d 119 (3d Cir. 1950) (state courts); Note, Attorneys: Interstate and Federal Practice, 80 Harv. L. R. at 1721-23.

2. The special problem of disbursements.

What has been said above applies to both compensation for time and for disbursements. The denial of reimbursement for the disbursements by Judge Ball seems especially unjust and discriminatory. Assuming that these are reasonable--and defendant Ball has emphasized that reimbursement will be allowed only for reasonable expenses--it seems difficult to understand why he will not allow these to non-New Yorkers when he will allow them to in-staters. By definition, these are expenses reasonably and necessarily incurred on behalf of the defendants, and it would seem to make no difference whether they are incurred by either an in-state lawyer or an out-of-stater.

The illogic in Judge Ball's position on this matter is reflected in his allowing the indictee-plaintiffs the expenses necessary and available under County Law §722-c for an investigator. See order in Goodman v. Ball of May 6, 1974. Why these expenses are different from the travel, living and supplemental investigations required for counsel--which Judge Ball denies--is impossible to discern. Under defendant Ball's ruling, the following illogical and unfair situation is inevitable: two indictees, one with a non-New York lawyer and the other with a New York lawyer, find it necessary for their lawyers to interview a witness personally after the investigator discovers those witnesses. The New York lawyer gets his interview expenses paid (assuming they are reasonable), but the non-New York lawyer must pay for the interview out of his own pocket or not do the interview.

Just a few years ago, the Supreme Court said:

> "Griffin v. Illinois [351 U.S. 12 (1956)] and its progeny establish the principle that the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." Britt v. North Carolina, 404 U.S. 226, 227 (1971).

Here, that principle has been unreasonably violated.

B. The Discrimination Interfered With The Attorney-Plaintiffs' Right To Travel.

Not only is the defendant's interest in effective assistance of counsel impaired, but the attorney's quite separate interest in interstate travel in order to practice his profession is impaired. Thus, just as in Dunn v. Blumstein, not just one but two very important interests are affected by this differentiating classification.

The impact on the right to travel is of course obvious. Although defendants replied in their argument below that the attorneys "are free to travel in interstate commerce if they so choose," that is not the test, as the Supreme Court has so often declared: the question is whether such travel is discouraged or burdened. See, e.g., Memorial Hospital v. Maricopa County, 415 U.S. 250, 94 S. Ct. 1076, 1082 (1974); Dunn v. Blumstein, 405 U.S. at 339-341; Shapiro v. Thompson, 394 U.S. 618 (1969). See Note, The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41, 112 (1974). And these cases merely extended to the residency requirement area, the very long line of cases establishing the right to travel as one of the most fundamental of rights. See, e.g., United States v. Guest, 383 U.S. 745, 759 (1966); Doe v. Bolton, 410 U.S. 179, 200 (1973); Edwards v. California, 314 U.S. 160 (1941); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868).

Economic favoritism toward in-staters has been particularly condemned by the Supreme Court under the privileges and immunities clause of the Constitution, Art. IV, §2, in an almost unbroken series of decisions in a wide variety of contexts. See, e.g., Toomer v. Witsell, 334 U.S. 385, 395-403 (1948); Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920); Blake v. McClung, 172 U.S. 239 (1898); Ward v. Maryland, 79 U.S. 12 (Wall.) 418 (1870); Paul v. Virginia, 8 Wall 168, 180 (1868). As the Supreme Court put it in

Toomer v. Witsell:

> "Article IV, §2, so far as relevant, reads as follows:
> 'The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.'
>
> "The primary purpose of this clause, like the clauses between which it is located--those relating to full faith and credit and to interstate extradition of fugitives from justice--was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation.
>
> "'Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.' Paul v. Virginia, 8 Wall. 168, 180 (1868).
>
> "In line with this underlying purpose, it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.
>
> "Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures."
> 334 U.S. at 395-96 (footnotes omitted).

See also, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), for a similar ruling under the commerce clause, which is also apposite here.

The importance for both clients and lawyers of interstate mobility has been frequently noted, and discriminations similar to those involved here

have been condemned consistently by commentators, as well as by judges. See, e.g., Morris, State Borders: Unnecessary Barriers to Effective Law Practice, 53 A.B.A.J. 530 (1967); Note, Retaining Out-of-State Counsel: The Evolution of a Federal Right, 67 Colum. L. Rev. 731, 747-48 (1967); Note, 19 Stan. L. Rev. 856 (1967); Note, 80 Harv. L. Rev. 1711 (1967). Most recently, a study for the Association of the Bar of the City of New York declared:

> "The interest of the attorney in practicing his profession is not substantially lessened by the mere fact that he is seeking to practice in an out-of-state case. State boundaries mean less today than they ever have. An attorney's clients do business in many states, travel freely between states, and may find themselves in legal difficulties, either civil or criminal, almost anywhere. A national law practice has become common and often necessary in many specialized areas of law. . . . Many trial lawyers have a nationwide reputation and are called upon to practice in many states. The success of an attorney's practice may depend as much upon open access to the courts of all states as upon access to the courts of his home state." Dorsen & Friedman, Disorder in the Court, 166-167 (1973).

See also, Spanos v. Skouras Theatres Corp., 364 F.2d at 166 (federal courts policy is to allow out-of-state counsel).

Discrimination like that involved here clearly burdens and in fact "penalizes" the right to travel, and a heavy burden of justification lies on the defendants. That right necessarily means more than the right to migrate and settle. Given the increasingly homogeneous nature of our society and our law--particularly in criminal law because of federal court rulings--and the fact that attorneys now often need to and do practice throughout the nation, the kind of discrimination practiced by Judge Ball inevitably falls heavily indeed on that need to travel.

This is not to say that restrictions cannot be imposed on out-of-state lawyers or that defendants are always entitled to have such lawyers appointed for them. But the question at this point is simply whether a ruling like Judge Ball's does in fact "penalize" those persons who have

exercised their constitutional right to travel. Memorial Hospital v. Maricopa County, 94 S. Ct. at 1082, and this holds true regardless of whether "anyone was actually deterred from travelling" by Judge Ball's ruling. Ibid.

Indeed, plaintiffs do not even have to argue too strongly that the ruling "penalizes" the right to travel, since the major purpose of such an argument is to urge that the ruling be subjected to the strict "compelling state interest" test. Although plaintiffs believe and urge that that test is the appropriate one, the fact is that at Pt. IIC infra will show, the ruling lacks even a rational basis.

C. There Is No Justification For The Discrimination.

The impact on the interests of lawyer and client is severe and undisputed. Fundamental rights are severely impinged upon: the right to effective assistance of counsel, and the right to travel free of discrimination based on status as out-of-staters.

Such severe burdens on fundamental rights can usually be justified only by a "substantial and compelling state interest." See Dunn v. Blumstein, 405 U.S. at 335. Nor is it enough if a substantial state interest were furthered--the least restrictive and most carefully "tailored" and "precise" rules must be adopted. Id. at 343.

But plaintiffs do not need to invoke a test so burdensome for defendants, for the justification offered by defendant Ball does not meet even the rational basis test

Although he refused to provide any explanation in the state court, in this proceeding, Judge Ball offered two reasons as follows:

> "That the Court in its discretion did not assign out of state attorneys because the Court was unfamiliar with their backgrounds, in that their competence and understanding of New

> York State law and criminal procedure was not certified to by having passed the New York State Bar Examination, or by admittance to practice by an Appellate Division of the Supreme Court of New York. In addition, the Court feels the expenses involved in transportation, living expenses, accommodations for office space, etc., would be an excessive burden upon the taxpayers of New York State depleting the state funds which were intended for the legal defense of the defendants." Ball affidavit, ¶12, App. p.

In short, the two reasons were: (1) concern about "competency," and (2) "expense." Neither is in any way supported by the undisputed record.

1. Competency.

It is almost impossible to understand how this could have been a serious concern. In the first place, Judge Ball only admitted the out-of-state lawyers after obtaining a detailed affidavit as to their competence and experience in criminal law. In some cases, such as Ernest Goodman's and Kenneth Mogill's, he asked questions about experience.* In all cases, he insisted that the affidavit indicate a willingness to associate with New York counsel, which all attorney-plaintiffs provided. And only after all of this did he exercise the discretion given him under the Court of Appeals rules to admit the attorney-plaintiffs pro hac vice.

The defendants' claim as to competency is thus clearly spurious. After all, Judge Ball did admit them pro hac vice, in the exercise of his discretion. Such admission surely required him to be confident of their competence, for what else is the discretion aimed at, and why did he insist on a very detailed statement of experience and association with New York counsel? Pro hac vice admission is not supposed to be a "mere formality," Spanos v. Skouras Theatres Corp., supra, and Judge Ball was not likely to treat it so.

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*Both, incidentally, have handled criminal cases from the trial level up to the Supreme Court of the United States.

Nor is there any reason to think out-of-state counsel will not perform well. As the Fifth Circuit said with respect to civil rights cases, to which the Attica cases are similar:

> "quality representation by a non-resident attorney in civil rights cases is to be expected. His admission to a state bar is a basic determinant both of the attorney's professional qualification and good moral character because the state bar is the standard-setting body that initially investigates and actively takes steps to insure that the canons of professional ethics are observed. This is borne out by the fact that in most federal district courts in the United States, including the Southern District of Mississippi, membership in the state bar is sufficient qualification for general admission to the district court bar. Association with a local lawyer gives the non-resident lawyer a source of knowledge about local rules and procedures and their proper application to the case at hand. Moreover, in the context of civil rights litigation, an out-of-state lawyer frequently develops an expertise because of his specialization in this field." Sanders v. Russell, 401 F.2d at 247.

If an Edward Bennett Williams or a Clarence Darrow were to seek assignment, Judge Ball could not, with a straight face, have raised a question as to competency simply because they were not members of the New York Bar. Here, we have lawyers who have spent years in the defense of criminal cases, in courts throughout the country. Indeed, if Judge Ball really had any doubts about any of the attorney-plaintiffs, he had an obligation to satisfy himself as to that even if he was only exercising his discretion to admit them pro hac vice. And true to this obligation, that is precisely what he in fact did, insisting on the affidavits described above, by occasionally asking questions of the lawyers as to their criminal court experience and by insisting on the attorney-plaintiffs' willingness to associate with local counsel. Only then did he admit them pro hac vice.

Defendants argue that Judge Ball did not "certify" plaintiffs' competence. But certification has nothing to do with competence or with compensation. Should the prisoner-plaintiffs have come into money, the

attorney-plaintiffs would be entitled to compensation as retained counsel regardless of whether they were certified. See Spanos v. Skouras Theatres Corp., supra. The fact that the money comes from the State should make no difference. Indeed, the Appellate Division expressly stated that Judge Ball could have appointed plaintiffs, which would have entitled them to compensation, regardless of the absence of certification. Thus, the only important matter is whether Judge Ball deemed them sufficiently qualified to exercise his discretion to admit them pro hac vice, and whether their bill for services and expenses was reasonable.

Again, this is not to say that regulation and limitations on out-of-state counsel cannot be imposed. See Spano v. Skouras Theatres Corp., supra; Sanders v. Russell, supra. Of course a state has an interest in ensuring that those who practice in its courts are qualified. See In re Griffiths, 413 U.S. 717, 722-23 (1973), and cases cited therein. But as in Griffiths, "no question is raised in this case as to appellant's character or general fitness," ibid., for Judge Ball acknowledged the attorney-plaintiffs' fitness when he admitted them pro hac vice. As in Griffiths, the "sole basis for . . . [their ineligibility] is . . . [their] status," ibid., as out-of-state lawyers, and that is not a valid basis.

2. Expense.

This reason is even more factually baseless than the other; from a constitutional point, it is unacceptable.

In the first place, the many cases cited above make it clear that "the conservation of the taxpayer's purse is surely not a sufficient state interest" for a rule penalizing fundamental constitutional rights. See, e.g., Memorial Hospital v. Maricopa County, 94 S. Ct. at 1085. Nor is the

desire to keep funds or resources for in-state residents. Sugarman v. Dougall, 413 U.S. 634, 643-45 (1973); Toomer v. Witsell, supra.

Second, the information set forth in plaintiffs' supporting affidavit makes it clear that the expenses for most of the attorney-plaintiffs are actually less than for New York lawyers. See Schwartz affidavit, ¶¶ 8-10, App. pp. 36a-37a. The "living expenses, accommodations for office space, etc.," referred to in Ball affidavit, ¶12, App. p. 18a, cannot be higher for out-of-state lawyers than for the many New York lawyers from outside Erie County, for both classes have to leave their homes. The only difference is in transport, and it is clear that many if not most of the out-of-state lawyers, including one of the named plaintiffs, are closer to Buffalo than the many lawyers from New York City! See, e.g., Schwartz affidavit, ¶10(a) (New York City), ¶10(g) (Detroit-Bedrosian): $73.68 for New York City as against $60.73 for Detroit, App. p. 37a. The fares from New York City and Washington, D. C. (where several of the non-New Yorkers are from) are equal, and from Columbus, Ohio (Handelman) almost that.

Judge Ball's lack of any real interest in expenses is also demonstrated by the fact that he assigned two New York lawyers who are presently working--and therefore travelling from--Boston, Mass. (Burnham) and Hartford, Conn. (Cohen), while denying assignment to a Massachusetts attorney also in Boston (O'Connor). Indeed, Judge Ball never even asked about expenses, travel or otherwise, of any attorneys.

Perhaps Judge Ball will not allow all of Burnham's and Cohen's expenses, for he need only allow "reasonable" expenses under County Law §18-b. But he could certainly take the same position toward the expenses of the attorney-plaintiffs by setting a limit equal to the farthest New York State lawyer. But he did not. He simply excluded all out-of-staters regardless of the real expenses.

CONCLUSION

"Ye shall have one manner of law, as well for the stranger as for one of your country." Leviticus, 24:22; Memorial Hopsital v. Maricopa County, 94 S. Ct. at 1084. Here, we have gross and unjustified discrimination in violation of fundamental rights.

The decision below should be reversed and, on the undisputed record, judgment entered for plaintiff-appellants.

Respectfully submitted,

HERMAN SCHWARTZ, ESQ.
EDWARD I. KOREN, ESQ.
N.Y.C.L.U. Foundation
525 O'Brian Hall, SUNYAB
Amherst, N. Y. 14260
(716) 636-2091

Attorneys for Plaintiff-Appellants

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Amherst, New York

On the brief:

DOREN G. GOLDSTONE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GEORGE BEDROSIAN, et al.,

Plaintiff-Appellants,

-vs-

No. 75-7099

JOSEPH D. MINTZ, etc., et al.,

Defendant-Appellees.

Certificate of Service

I hereby certify that on March 21, 1975, I mailed copies of the within Brief and Appendix* to Louis J. Lefkowitz, Esq., Attorney General, State of New York, Two World Trade Center, New York, N. Y. 10047, and to Richard Griffin, Esq., 2300 Erie County Savings Bank Building, Buffalo, N. Y. 14202, counsel for Defendant-Appellees.

HERMAN SCHWARTZ

* Appendices in separate wrapper.